FILE COPY

NOV 1 .

JAMES R. BROWNING

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 16

JAMES E. PEDDICORD, PAUL V. S[illegible] and [illegible] O. SIMES, JOHN S. HAY and DORIS D. [illegible],

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR REHEARING

PAUL E. D[illegible]

Counsel for Petitioners

Of Counsel:

MAURICE E. O'D[illegible]

[illegible] 838 Tower Building

Washington, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 46

JAMES E. PEURIFOY, PAUL V. STINES AND BETTY O. STINES, JOHN S. HALL AND DORIS D. HALL,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR REHEARING

Petitioners respectfully pray this Court to grant rehearing of its decision rendered in this proceeding under date of November 10, 1958.

As reasons for granting rehearing, petitioners respectfully show as follows:

I

The decision of this Court was rendered on the basis of the principle of law that this Court will not further review a factual matter that has once been reviewed

by an appellate Court which has made a "fair assessment of the record". In this respect this Court said (p. 2):

> "Resolution of this case as presented to us turns, therefore, upon a narrow question of fact—Was the petitioners' employment 'temporary' or 'indefinite'?"

This position *assumes* that temporary employment is a valid requirement for deductibility. This is a naked question of law which has never been answered by this Court. The words "temporary" and "indefinite" do not appear in the statute. The essentiality of temporary employment as a condition of deductibility must first be established before the necessity arises for petitioners to show facts to prove their employments were temporary.

The matter of determining whether or not an employment is "temporary" or "indefinite" relates solely to the question raised by requirement two of *Commissioner* v. *Flowers*, 326 U.S. 465, which states that "the expense must be incurred 'while away from home'". This requires a determination of whether or not the word "home" as used in the statute means a "place of indefinite employment but does not mean a place of temporary employment." This is purely a question of law.

It is therefore respectfully submitted that a question of pure law has been presented to this Court which logically and rightly requires a determination of its validity. This question is whether or not temporary employment is a fourth requirement for deductibility of travel expenses. This question must properly be

answered before there can arise a need for the petitioners to show facts to prove they have met such requirement.

II

In its opinion the Court refers to the manner in which the case was presented to the Court, saying (p. 2):

> "However, as the case has been presented to us we have found it inappropriate to consider such questions."

In his brief, respondent stated (p. 10):

> ". . . In the Commissioner's view the taxpayers here are not entitled to the deduction claimed as travel expenses because they were not incurred while 'away from home'."

Since the stipulated facts show the petitioners were away from "home" as that word is ordinarily understood, and since respondent bottomed his entire case on his interpretation of the word "home", it is respectfully submitted that this question of law is squarely presented to this Court in this proceeding.

III

It is also submitted that this Court has subordinated itself to the Tax Court in this decision. In this respect this Court said (p. 2):

> To this rule, however, The Tax Court has engrafted an exception . . ."

The rule referred to is rule three of the *Flowers* case rendered by this Court. The "exception" referred to

is one "engrafted" on a Supreme Court rule by the Tax Court. An "exception" to a rule of law changes and overrides the underlying rule to which it constitutes an exception. By doing so, it creates a new rule of substantive law. This is equivalent to saying that the "exception" engrafted by the Tax Court is paramount to the basic rule of the Supreme Court. This places the decisions of the Tax Court above those of the Supreme Court. By sanctioning such act, this Court subordinates itself to the Tax Court.

There was *no* factual determination by the Court of Appeals that requirement three relating to the "exigencies of the business" was not met. Respondent conceded that requirement three had been met.

As shown in the quotation set forth in Paragraph I above the allegations of a factual determination made by the Court of Appeals below related solely to the question of "temporary versus indefinite" employment. This is a matter falling exclusively under requirement two of the *Flowers* case.

The "exception" which the Tax Court has "engrafted" is not an exception to requirement three but an exception relating to requirement two of the *Flowers* case relating to the meaning of "home". The exception is its rule "that a place of temporary employment is not a tax home". This returns the problem to the meaning of the word "home". This is purely a question of substantive law.

By recognizing the existence of an "exception" to the mandates of this Court as developed in the *Flowers* case when no such exceptions exist, this Court is, in effect, admitting in this decision that it is not the su-

preme law of the land. This matter is clearly within the scope of the *Flowers* decision. Logically, there can be no "exceptions" to its mandates. The question is simply whether or not the three requirements of *Flowers* have been met. Respondent's case rests entirely on the meaning of the word "home". As defined under the "temporary versus indefinite" approach, the so-called exception of "temporary" employment has become a fourth requirement of deductibility when this Court has said in *Flowers* there are three.

CONCLUSION

This country needs a decision on this vital question of law. The "difficulty and litigation" engendered by this problem noted in the *Flowers* case continues unabated and with increased intensity since that decision. Theoretically the right of this Court to decide this question is beyond dispute. If this opinion stands, there is no way the question can ever be presented to this Court. The device of vaulting a rule of law by focusing attention on the evidence to sustain the application of such rule can then be used to prevent review of the rule of law itself.

If this device is valid in this case, it is valid for other cases. In theory this could divest this Court of much, if not most, of its appellate jurisdiction. Counsel, of course, recognizes that this will not happen. However, the theory of this decision would produce such result.

This decision sanctions and condones a long continued practice of misinterpretation and misapplication of the rules of law announced in the *Flowers* case. It recognizes the judicial existence of an "exception"

to its own mandates which as a matter of jurisprudence cannot exist. It improperly puts the Congress of The United States in the embarrassing position of selfishly securing a travel deduction for itself while turning its back on the rest of the country.

For the reasons set forth above it is respectfully urged that rehearing be granted.

DANIEL R. DIXON
Counsel for petitioners
600 Capital Club Building
Raleigh, North Carolina

Of Counsel:

MARTIN F. O'DONOGHUE
Suite 831, Tower Building
Washington, D. C.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 of the rules of this Court.

DANIEL R. DIXON
Counsel for petitioners

SUPREME COURT OF THE UNITED STATES

No. 46.—October Term, 1958.

James E. Peurifoy, Paul V. Stines, Betty O. Stines, et al., Petitioners. v. Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[November 10, 1958.]

Per Curiam.

The petitioners were employed as construction workers at a site in Kinston, North Carolina, for continuous periods of 20½ months, 12½ months, and 8½ months, respectively, ending in the year 1953. Each of the petitioners maintained a permanent residence elsewhere in North Carolina. In reporting his adjusted gross income for 1953 each petitioner deducted amounts expended for board and lodging at Kinston during the period of employment there, and for transportation from Kinston to his permanent residence upon leaving that employment. These deductions were disallowed by the respondent. Ensuing Tax Court proceedings resulted in a decision in favor of the petitioners. 27 T. C. 149. The Court of Appeals reversed. 254 F. 2d 483. We granted certiorari, 356 U. S. 956, to consider certain questions as to the application of § 23 (a)(1)(A) of the Internal Revenue Code of 1939 * raised by the course of decisions

* "§ 23. Deductions from gross income.

"In computing net income there shall be allowed as deductions:

"(a) Expenses.

"(1) Trade or business expenses.

"(A) In general.

"All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including . . . traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; . . . ." (26 U. S. C. (1952 ed.) § 23 (a)(1)(A).)

in the lower courts since our decision in *Commissioner* v. *Flowers*, 326 U. S. 465. However, as the case has been presented to us we have found it inappropriate to consider such questions.

The issue is whether the amounts in question constituted allowable deductions under § 23 (a)(1)(A). Generally, a taxpayer is entitled to deduct unreimbursed travel expenses under this subsection only when they are required by "the exigencies of business." *Commissioner* v. *Flowers*, *supra*. Application of this general rule would require affirmance of the judgment of the Court of Appeals in the present case.

To this rule, however, the Tax Court has engrafted an exception which allows a deduction for expenditures of the type made in this case when the taxpayer's employment is "temporary" as contrasted with "indefinite" or "indeterminate." Compare *Schurer* v. *Commissioner*, 3 T. C. 544; *Leach* v. *Commissioner*, 12 T. C. 20; *Albert* v. *Commissioner*, 13 T. C. 129, with *Warren* v. *Commissioner*, 13 T. C. 205; *Whitaker* v. *Commissioner*, 24 T. C. 750. The respondent does not in the present case challenge the validity of this exception to the general rule.

Resolution of this case as presented to us turns, therefore, upon a narrow question of fact—Was the petitioners' employment "temporary" or "indefinite"? The Tax Court, stating that "each case must be decided upon the basis of its own facts and circumstances," 29 T. C. 157, found that their employment was temporary. The Court of Appeals, also recognizing that the question was "one of fact," held that on the record the Tax Court's finding of temporary employment was "clearly erroneous." 254 F. 2d, at 487.

In reviewing the Tax Court's factual determination, the Court of Appeals has made a fair assessment of the record. 26 U. S. C. (Supp. 1952 ed.) § 7482; Rule 52 (A).

Fed. Rules Civ Proc; cf. *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474. That being so, this Court will not intervene. *Federal Trade Commission* v. *Standard Oil Co.*, 355 U. S. 396, 400–401; *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502–503.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 46.—October Term, 1958.

James E. Peurifoy, Paul V. Stines, Betty O. Stines, et al., Petitioners, v. Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[November 10, 1958.]

Mr. Justice Douglas, with whom Mr Justice Black and Mr. Justice Whittaker concur, dissenting.

As *Flowers* v. *Commissioner of Internal Revenue* [1] indicated, the prerequisites to a deduction for travel expenses under § 23 (a)(1)(A)[2] are threefold: The expenses must be reasonable and necessary,[3] they must be incurred while "away from home," and there must be a "direct connection between the expenditure and the carrying on of the trade or business *of the taxpayer or his employer*." I think the taxpayers in this case have met those conditions and should be allowed the claimed deductions.

The meaning of "home" was expresly left undecided in *Flowers* but is squarely presented in the instant case.[4]

[1] 326 U. S. 465.

[2] § 162 (a)(2) of the 1954 Internal Revenue Code.

[3] There is no contention made that the expenses here were not reasonable and necessary.

[4] The Court's opinion does not reach this question because it decides the case on a ground not raised by the respondent. See note 6, *infra*. Instead it affirms the Court of Appeals decision as relying on a factual determination. The Court of Appeals reversed the Tax Court because it thought the latter tribunal had unwarrantedly extended the "exception" to the *Flowers* case for expenses while "temporarily" away from home. Both courts agreed that taxpayers were away from their actual homes, but the Court of Appeals thought the absence of such duration precluded a deduction. Nowhere in the statute or in *Flowers* is a distinction made between "tem-

I disagree with the Commissioner's contention that "home" is synonymous with the situs of the employer's business. Such a construction means that the taxpayer who is forced to travel from place to place to pursue his trade must carry his home on his back regardless of the fact that he maintains his family at an abode which meets all accepted definitions of "home." I do not believe that Congress intended such a harsh result when it provided a deduction for traveling expenses. These construction workers do not have a permanent locus of employment as does the merchant or factory worker. They are required to travel from job to job in order to practice their trade. It would be an intolerable burden for them to uproot their families whenever they change jobs, if those jobs happen to take them to a different locality. When they do not undertake this burden they are living "away from home" [5] for the duration of the term of the jobs.[6]

---

porary" and "indefinite" absences from home, and in fact such a distinction improperly emphasizes duration of the absence as the determinative factor in deciding where the taxpayer's "home" actually is.

[5] This definition of "home" will not permit any taxpayer who lives apart from his family to deduct his maintenance expenses, no matter what the nature of his trade or his employer's business. If the expenses are necessary and appropriate to neither the employer's business nor the employee's trade they are personal expenses under § 24 (a)(1) (§ 262 of the 1954 Internal Revenue Code). And of course the facts may show that a taxpayer has in fact abandoned his original "home" as his principal place of residence.

[6] The *Flowers* case does not hold, as the Court suggests, that the deduction is necessarily unavailable if not required by the exigencies of the *employer's* business. In that case a traveling expense deduction was denied a lawyer employed by a railroad who chose to maintain his home in Jackson, Mississippi, although, as the Court found, the permanent place of his business was in Mobile, Alabama. The Court held the expenses of traveling between Jackson and Mobile were not appropriate or necessary to the railroad's business. In the present case, however, the expenses incurred were necessary, not to the business

We have, then, not a question of fact which should be resolved below rather than here. We have a mixed question of law and fact. The facts will turn largely on the resolution of the question of law. The error below was mainly in assuming (albeit silently) a narrow construction of the statutory term "home."

---

of the contractor for whom the taxpayers worked, but for the taxpayers themselves in order to carry on their chosen trade. *Flowers* did not decide that, because expenses are not required by the employer's business, they can never be justified as necessary to the employee's trade. The Government does not here contend that the expenses were nondeductible because inappropriate to the trade or business of the employer, the ground of decision in *Flowers*. Such a contention was not assigned as a reason for disallowance of the deduction nor presented to the courts below.